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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 1241.

THE UNITED STATES, EX RELATIONE LUTZARDA ANGARICA DE LA RUA,
Plaintiff in Error,

vs.

THOMAS F. BAYARD, AS SECRETARY OF STATE.
Defendant in Error.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

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SUPREME COURT OF THE UNITED STATES,

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THE UNITED STATES, *ex relatione* LUTZARDA ANGARICA DE LA RUA, Executrix, etc., Plaintiff in Error, vs. THOMAS F. BAYARD, as Secretary of State, Defendant in Error.	No. 1241.

Brief in Behalf of the Plaintiff in Error.

Statement of the Case.

This case comes before the Court upon a writ of error to the Supreme Court of the District of Columbia, to review the final judgment of the General Term of that Court, dismissing an application made by the plaintiff in error for the writ of *mandamus*, to be directed to the defendant in error, as Secretary of State, to compel the payment of the earnings resulting from the investment of a part of a fund paid by the government of Spain to the Secretary of State in satisfaction of a judgment recovered by the relator's testator before the late Spanish-American Claims Commission.

The facts necessary to the consideration of the case are as follows:

On the 12th of February, 1871, the Minister of the United States to Spain, and the Spanish Minister of State, concluded a Convention on the part of their respective Governments, under which certain claims for injuries done to citizens of the United States by the authorities of Spain in Cuba, were to be referred to a joint Commission to meet in Washington. It was further provided by this Convention that such claims and the testimony in favor of them should be presented only through the Government of the United States; that the award in each case should be in writing, and, if indemnity be given, the sum to be paid should be expressed in gold coin of the United States; and that the two governments would accept the awards made in the several cases submitted as final and conclusive, and would give full effect to the same in good faith as soon as possible.

17 U. S. Stats. at Large, 339;
Record, fols. 1, 2, 60.

Accordingly, the relator's testator, Joaquin Garcia de Angarica, in common with a large number of other claimants, presented his claim to the Commission, and was ultimately awarded the sum of $748,-180.00, with interest at 6 per centum from the first day of November, 1875, until paid.

Record, fol. 2; and p. 25, Claim No. 13; page 29, Claim No. 13; page 39, Claim No. 13.

This amount, with interest, was paid by Spain to the Secretary of State in office at the time, in two installments, one on March 27, 1877, and the other on October 8, 1877.

Record, folio 3; and pp. 25 and 29.

The award to Mr. Angarica was subsequently paid

to him by the Secretary of State, in due time, except $41,129.74, being five per centum thereof, which the Secretary of State withheld, stating (as to all the claims paid) that "five per centum of the amount "due in each case will be reserved for the present "to meet the expenses of the Commission until a "payment to cover such expenses shall have been "made by Spain in conformity with the provision "in that regard of said agreement of February 12, "1871, between the United States and Spain."

Record, folios 4, 46.

The five per centum thus retained was invested by the Secretary of State in United States bonds, and the relator's testator advised thereof by the Secretary of State as follows: "It is hoped that "no great delay will occur in receiving the pay- "ment from Spain which will liberate this reserve "for expenses, *and the Department will expect to* "*keep this reserve invested in interest bearing* "*securities of the United States to cover the de-* "*lay in its distribution to the claimants.*"

Record, folio 6.

Accordingly, the money reserved from Mr. Angarica was invested in securities of the United States, and afterwards the accumulations thereof, as they accrued from time to time, were similarly invested, so that the fund rapidly increased by this process of compounding.

See letter Sec'y of State, Record, folio 22.

The fund was reserved until the 12th of February, 1884, that is, between six and seven years, when the principal sum of the five per centum reserve, namely, the sum of $41,129.74, was paid to the relator *without the accretion resulting from its investment.*

Record, folios 6 and 7.

The relator's attorneys thereupon opened correspondence with the Secretary of State for the purpose of obtaining the whole fund, which resulted in the final refusal of that officer to pay the increase referred to, whereupon the relator applied for the writ of *mandamus*. This correspondence, showing, as it does, the various grounds upon which the Secretary of State declined the request, is set forth at large in the petition for the writ.

Record, folios 7 to 22, inclusive.

No question of fact was raised in the Court below, although the defendant in his answer in form denied that a judgment was rendered in favor of the relator's testator, and alleged that the same was in favor of the United States.

Record, folio 57.

This allegation was, however, understood and treated as a mere denial of the *legal effect* of the judgment, and not to raise any issue of fact.

After the cause had been argued on the petition and exhibits filed by the relator and the answer of the respondent, the Court delivered an opinion in which every ground taken by the Secretary of State against the payment of the fund in question, in his correspondence with the relator's attorneys, was overruled and decided in favor of the relator, but the Court refused the writ because of a supposed lack of power to grant it.

See the Opinion, Record, folio 65.

Brief of Argument.

As we consider this case, it presents a very simple aspect, the questions being, (1) whether the relator had a clear legal right to the fund in dispute, and (2) whether the writ of mandamus is the remedy.

The contention of the plaintiff in error has been, and still is, that as the principal sum was declared the property of the relator's testator and expressly invested for his benefit by the Secretary of State in office at the time of its receipt from Spain, his successor, in the absence of fraud, or of any new element tending to disturb the judgment of the commission, was without power to overrule the action of his predecessor; that when the principal fund was released, the increment thereof resulting from its investment, by the express terms of the trust declared upon its original retention, as well as by the familiar rule that the accessory follows the principal, should have been released also, and that, as the law afforded no other remedy to operate upon an executive officer in his official capacity, *mandamus* would lie to compel its payment.

But the case was obscured in the Court below by a technical defense relating to the original character of the fund when it first came into the hands of the Secretary of State, with regard to which the respondent averred in his answer "that when the said money was received "by the then Secretary of State it came into his "hands with duties to the United States and possi "bly duties to the Kingdom of Spain, which duties "were in the one case and would have been in the "other case paramount and superior to any duty "in the premises to the said petitioner and her "testator," and upon that defense the learned counsel for the respondent argued, and the Court below seems to have decided, that the payment by Spain to our Secretary of State in satisfaction of the judgment in Mr. Angarica's favor by the Commission conferred no right upon Mr. Angarica to enforce its payment to him.

Record, folios 57, 58, 66, 67.

We consider this a somewhat startling doctrine when sought to be applied to the peculiar nature of the transaction between Spain and the United States in this case, especially under our system of law; but as its decision is unnecessary to the disposal of the controlling questions now before the Court, we shall assign it to a subordinate place.

The material questions now to be considered and decided are:

First.—Did the action of the Secretary of State, in reserving the five per centum from Mr. Angarica, and investing it with the express declaration and promise that the income from such investment should be paid to him, confer such a character upon that fund as his successor, in the absence of new and sufficient facts, could not overrule or modify?

Second.—Independently of the first question, does not the accretion of a fund by investment follow the principal and, in the absence of other legal disposal of it, belong to the person ultimately declared entitled to the principal, and is not this rule applicable to an executive officer of the United States who is either charged by law, or implication thereof, with the execution of a duty with respect to money belonging and finally paid to a citizen?

Third.—Can the claimant of money in either of the above cases enforce its payment by the writ of *mandamus*?

Before entering into this discussion, it may be proper here to remind the Court that it is not claimed by the respondent that the money in ques-

tion is reserved for the payment of the expenses of the commission, nor is its detention insisted upon for any reason relating to the purpose for which the principal five per centum was retained, but, on the contrary, upon the ground that the relator is in no event entitled to it. In other words, the respondent states, "I have no option but *to cause the* "*accumulation in the present case to pass into* "*the public treasury*, where it is always at the su- "preme disposal of Congress."

Record, folio 18.

I.

Did the action of the Secretary of State in reserving the five per centum from Mr. Angarica, and investing it with the express declaration and promise that the income from such investment should be paid to him, confer such a character upon that fund as his successor, in the absence of new and sufficient facts, could not overrule or modify?

We respectfully submit and insist that the affirmative of this proposition is the necessary effect of that investment and declaration of trust, (1) because it was competent for the former Secretary of State to make such a disposition of the fund, and (2) because such action cannot be reversed by his successor.

The allegations of the petition in this respect, as in every other matter of fact, are uncontroverted.

The averments in that particular are that the Secretary of State in office at the time the principal fund was received from Spain, and who ordered

the provisional retention of five per centum "*caused* "*the same to be invested in bonds or securities of* "*the United States of America, with the intent and* "*purpose of paying the interest or income thereof* "*earned during the period of its retention and* "*withholding of the said sum of money, aforesaid,* "*together with the said principal sum, to the person or* "*persons entitled to receive said main or principal* "*sum, and, accordingly, so notified the said Joaquin* "*Garcia do Angarica in the following terms to* "*wit: 'It is hoped that no great delay will occur* "*in receiving the payment from Spain which will* "*liberate this reserve for expenses, and the Depart-* "*ment will expect to keep this reserve invested in* "*interest-bearing securities of the United States* "*to cover the delay in its distribution to the claim-* "*ant's; and, furthermore, your petitioner alleges* "*and shows that in a letter to the attorneys of your* "*petitioner, bearing date the 18th day of Septem-* "*ber, 1880, the said Secretary of State again af-* "*firmed and declared such intention, and agree-* "*ably thereto, stipulated and promised your peti-* "*tioner, through her said attorneys, so to pay the* "*same, which said letter or a duly verified copy* "*thereof your petitioner stands ready to produce* "*before this honorable Court if required.*"

Petition, Record, folio 6.

(1.) The law will presume that the Secretary of State who made this decision acted with authority. He was dealing with a fund received from a foreign nation in satisfaction of claims of citizens, which had been realized through the agency of diplomacy, and his action in the premises was pursuant to law.

The statute provides that:

"The Secretary of State shall perform such duties "as shall from time to time be enjoined on or

"intrusted to him by the President relative to cor-
"respondences, commissions, or instructions to or
"with public ministers or Consuls from the United
"States, or to negotiations with public ministers
"from foreign States or princes, or to memorials or
"other applications from foreign public ministers or
"other foreigners, *or to such other matters respect-*
" *ing foreign affairs as the President of the United*
" *States shall assign to the Department*, and he
"shall conduct the business of the department in
"such manner as the President shall direct."

U. S. Rev. Stats., sec. 202.

Primarily, of course, the management of foreign affairs resides with the President of the United States, but the Secretary of State, in common with the other heads of the Executive Departments, is the organ of the President for the administration of the affairs of the Department over which he presides, *and the direction of the President is presumed in all matters issuing therefrom.*

Wilcox *v.* Jackson, 13 Peters, 498;
U. S. *v.* Eliason, 16 Peters, 291, 302;
Relation of President to Departments, 7 Op. Atty. Gen. (Cushing), 453.

This rule is fully recognized by the Court below in its opinion in this case.

See opinion, Record, fol. 66.

(2) It is also an established rule of executive administration sanctioned alike by all the precedents in the executive department of the government, and by the highest judicial authority, that the action of one head of a department is binding upon his successor. In other words, each administration considers the acts of its predecessors final and conclu-

sive, so far as executive authority is concerned, and in the absence of fraud or mistake—(neither of which are pretended in this case)—the decision of one head of a department is absolutely binding on his successor.

In the case of the United States *v.* The Bank of the Metropolis, 15 Peters, 377, 401, this Court said: "The third instruction asked the Court to say, "among other things, if the credits given by Mr. "Barry were for extra allowances which the said "Post Master General was not legally authorized to "allow, then it was the duty of the present Post "Master General to disallow such items of credit. "The successor of Mr. Barry had the same power, "and no more than his predecessor, and the power "of the former (*sic*) did not extend to the recall of "credits or allowances made by Mr. Barry, if he "acted within the scope of official authority given "by law to the head of the Department. This "right of an incumbent of reviewing a predecessor's "decisions extends to mistakes in matters of fact "arising from errors of calculation, and to cases of "rejected claims in which material testimony is "afterward discovered and produced. But *if a "credit has been given or an allowance made*, as "these were, by the head of a Department, and it "is alleged to be an illegal allowance, the judicial "tribunals of the Country must be resorted to to "construe the law under which the allowance was "made, and to settle the rights between the United "States and the party to whom the credit was "given. *It is no longer a case between the correct-"ness of one officer's judgment and that of his "suc cessor.*"

As a rule of action, also, obtaining in all the executive departments, nothing is better settled than

that the acts of one head of a department cannot be undone by his successor.

The Right of Review, 2 Op. Atty. Gen., 8;
Power Sec'y Treasury, 5 Op. Atty. Gen., 664;
Case of the Western Pac. R.R. Co., 13 Op. Atty. Gen., 387;
Case of R. H. McGoon, 13 Op. Atty. Gen., 456.

This is also one of the points in which the learned Court below sustained the relator.

It said: "We conceive, then, that these accu-"mulations cannot be withheld from the use de-"clared in this executive trust *without reversing* "*the original executive decision and disregarding* "*the effect of the executive action by which the trans-*"*action was moulded and defined.* Of course, in "cases of subsequently discovered fraud or of plain "mistake of fact or law, a later executive could not "hesitate to treat the whole matter as an original "question, notwithstanding a former decision; *but* "*in the absence of these conditions, the settled* "*practice of this Government has been*, as the re-"spondent stated in his letter to petitioner's at-"torneys of October 7, 1885, *to treat the former ex-*"*ecutive action as conclusive.*"

Opinion, Record, folio 70.

And the learned Court below, in the same place, proceeds further, and says: "*But the conclu-*"*siveness of the original action in this case* "*stands on far stronger ground than the rule* "*which treats mere decisions as conclusive.* It "stands on the principle that *a trust once estab-*"*lished is not to be undone because the trustor af-*

" terwards disapproves of his own act, anymore " than a contract or conveyance may."

Opinion, Record, folio 70.

Now, with these facts admitted, and the above stated principles of law in force, we respectfully submit that our case is absolutely clear, so far as the relator's *legal right* to the fund is concerned, and that we might close this branch of the case at this point.

II.

But independently of the first question, does not the accretion of a fund by investment follow the principal, and, in the absence of other legal disposition of it, belong to the person ultimately declared entitled to the principal, and is not this rule applicable to an executive officer of the United States, who is either charged by law, or implication thereof, with the execution of a duty with respect to money belonging and finally paid to a citizen?

(1.) It would seem to be a clearly established rule of law that the fruits of an investment of money follow the principal. This may be said to result from a rule universally recognized, both in the civil and common law systems. It is embodied in the common law maxim "*accessorium non ducit, sed sequitur suum principale*," and in the civil law maxim "*res accessora sequitur rem principalem.*"

The principle itself has a wide and comprehensive application and might be illustrated by many examples. It is applied to the young of animals, the fruit and produce of trees, the alluvion or deposit

on land, and to other descriptions of property originating under analogous circumstances. So, likewise, *interest and other fruits of money are equally accessory to the principal, and belong to the person entitled to the main fund.*

Broom's Legal Maxims (7th Am. Ed.), 496;
Channnell *v.* Robotham, Yelv., 68;
Coke Litt., 152a, 389a;
Finch's Law, 23;
Shep. Touch., 89;
Clarke *v.* Alexander, 8 Scott, N. R., 165;
Hollis *v.* Palmer, 3 Bing., N. C., 713;
Florence *v.* Drayton, 1 C. B., N. S., 584;
Bective *v.* Hodgson, 10 H. L. Cas., 665;
Sullivan *v.* Winthrop, 1 Sumner, 1;
Barney *v.* Saunders, 16 How., 543.

There would seem to be no occasion for an extended analysis of the authorities upon this point, but a few of the later cases perhaps deserve special notice.

In Sullivan *v.* Winthrop (1 Sumner, 1, *supra*,) it was made a question whether an executor was liable to pay over to a legatee money earned by the investment of a legacy before it became legally due and payable to the legatee. The executor, had, under the statute, one year within which to pay the legacy. He meantime invested the funds in his hands which earned interest. The Court, by Mr. Justice Story, decided that *this accretion followed the main fund, and belonged to the legatee, although, when earned, the executor was under no legal obligation to pay the original fund.*

In Barney *v.* Saunders, (16 How., 543, *supra*,)the same principle was applied by this Court, and a

trustee was compelled to pay *the whole earnings* of a fund in his hands, *although in excess of the ordinary rate of interest, and notwithstanding his liability was for the usual rate of interest only.* The excess was awarded to the *cestui que trust* as *incident and accessory to the main fund.*

Again, in Bective *v.* Hodgson, (10 H. L. Cas., 665, *supra*), Lord Chancellor Westbury referred to the income of money and other personal property following the principal as an accessory, as *one of the "cardinal principles of the law of property."*

If reference be had to the civil law, the principle now contended for will be found to be established with equal clearness and force.

See Mackeldey's Roman Law, Dropsie's Ed., secs. 272-279.

It is respectfully submitted, that the application of any other rule would work a gross perversion of justice; for, as was said by M. Bugnet, the learned commentator on Pothier (Oeuvres, Vol. 2, 115), *"Autrement ils s'enrichiraient aux dépens d'au-"trui—otherwise they (trustees) would enrich them-"selves at the expense of others."*

(2). It would seem almost a waste of words to argue that this rule of law, as well as other ordinary rules of law, in the absence of statutory provisions, governs the head of the Federal Executive Departments. The reports of this Court are full of cases in which the law relating to commercial paper, contracts and other obligations has been applied to the executive departments in the conduct of their business. In fact, no other rule could be applied consistently with free institutions, nor without conceding to the government and its officers the attributes of despotism; for in such a case they would be placed above the law.

We insist, therefore, that, with respect to the fund received from Spain for Mr. Angarica, admitted, as it always has been, to be his property, the Secretary of State was a mere trustee, and bound to render to the owner of the fund the whole increase thereof, deducting, of course, the expenses purely incidental to its investment.

The application of the principle in question to the present case does not militate against the general rule that the government does not pay interest on its obligations.

It may be conceded for the purposes of this case, that the position assumed by the Secretary of State in his letter of October 7, 1885 (petition, par. 18, Record, folio 13) is correct, and that the cases cited by him establish the rule that the government does not pay interest on its debts. And yet that doctrine furnishes no rule for the present case. The theory is that the government is always presumed to be ready to pay its debts. *But this case does not involve the payment of any debt due by the United States. Nor is any compensation sought by the Government for the detention of the relator's money.* It is true the fund was invested in Government bonds; but that does not enter into the case, for the bonds purchased by the Secretary of State had been issued by the Government as a borrower of money for its own use, and it is not in anywise material to the present point whether an officer of the Government or a private individual held them. The relator does not ask the Government to pay interest on the money retained from her. She asks that the Secretary of State, as a public functionary, *account for the gains he has made by the investment of her money*, howsoever such investment may have been made, whether in Govern-

ment bonds, railroad stocks, bond and mortgage on realty, or otherwise.

Nor does the action of Congress in disposing of accumulations realized by the investment of particular funds paid by foreign powers as *national indemnities*, or derived from the investment of other funds under its sole control, furnish any proper guide for this Court in determining the present question.

It is true that in some cases Congress has omitted distributing to private citizens suffering injury the accretion arising upon national indemnity funds. In other cases it has distributed the accretion also, notably in the case of the Geneva Award. There is, in fact, no general rule upon the subject and, therefore, no guide is furnished by the precedents in that respect. But the Court will observe that in all the cases in which Congress has acted, the fund constituting the subject-matter of action has been a *national indemnity, i.e.*, money paid *in solido* to satisfy *a national wrong*. In such cases the money has been paid to the United States and to its use. The government could do as it pleased with it, and therefore Congressional legislation has been necessary, either to cover the money in the Treasury and appropriate it to national uses, or to distribute it to citizens who may have suffered private damage. The relator's case, on the other hand, is wholly different. The money was paid by Spain *specifically to satisfy Mr. Angarica's judgment, and for no other purpose*. Such payment required no legislalation of Congress to carry its object into effect. In fact, it would be an obvious violation of the Constitution for Congress to attempt to divert it from this purpose, for such action would be taking private property for public use without compensation. This is, and always was, *Mr. Angarica's money*, and it would be

simple confiscation for Congress to interfere with its ultimate payment. No parallel, therefore, can be drawn between the present case and those in which Congress has legislated.

Upon this ground also, namely, because the accretion in question is but a mere incident or accessory to principal, we respectfully insist that the legal right of the relator is clear.

III.

Having thus, by reason of both the foregoing grounds, a clear legal right to the payment sought, we submit that the relator is entitled to the writ of mandamus.

The Court below held that the relator was not entitled to the writ for two reasons, namely:

1. Because the fund sought was one over which tribunals of justice could not exercise jurisdiction at the instance of a private party claiming it; and

2. Because there was no duty imposed upon the Secretary of State, by treaty or statute enjoining its payment to the relator.

Opinion, Record, folios 66, 67.

We contend that the judgment is erroneous on both these grounds.

(1.) The general proposition contended for by counsel for the respondent and acted upon by the Court below, may be conceded, namely, that a fund obtained by reclamation of one nation from another nation for injuries to citizens of the demanding nation confers no right upon the injured citizens there-

of to indemnity from the Government, *and yet that rule, even if it be sound, does not control or even furnish a guide to the decision of this case.* The cases relied upon by counsel for the respondent are those of the Great Western Insurance Co. *v.* The United States, 19 Ct. Claims, 217; S. C., 112 U. S., 193; and the English cases of Rustomjee *v.* The Queen, 1 Q. B. Div., 487; S. C., 2 Q. B. Div., 69; and Burnand *v.* Rodocanachi, 5 C. P. Div., 424; S. C., 6 Q. B. Div. (C. A.), 633; S. C., 7 App. Cas. (H. L.), 333.

We do not deem it necessary in this case to question the rule laid down in those cases, although this Court in the case of the Great Western Insurance Co. *v.* U. S., *supra*, carefully abstained from giving its assent to the doctrine, and decided the case on another ground.

It is to be observed, also, that the English case of Burnand *v.* Rodocanachi, *supra*, is directly opposed to the principles laid down by this Court in similar cases.

> See Comegys *v.* Vasse, 1 Peters, 193, 216;
> Judson *v.* Corcoran, 17 How., 612;
> Lewis *v.* Bell, 17 How., 616.

So that the doctrine of the Court below in the broad sense asserted is based upon the case of the Great Western Insurance Co. *v.* the U. S., in the Court of Claims, above referred to, the only authority or precedent for which is an isolated case in England, whose government and political system is monarchial and unlike ours, and which case this Court carefully avoided assenting to when it came up for review.

But, as before stated, we do not deem it necessary to question the rule contended for, because the facts of this case are different. All the cases above referred to relate to the fund commonly known as

the Geneva Award. It is commonly known, and, as a part of the history of the country, this Court will, doubtless, take judicial knowledge of the fact, that the award to the United States against Great Britain by the tribunal of arbitration at Geneva was a sum *in gross*, or a *lump sum*, as it has been called, paid by Great Britain to the United States as a *national indemnity*, and *without reference to the losses of individual citizens*. There may be great propriety for the contention that when a whole country is in a state of war, when a nation is struggling for its life, when demands of and sacrifices by its citizens are required, and when the whole people are involved in a common effort and peril in repelling an enemy, the losses of an individual or a particular class of individuals may be considered swallowed up, as it were, in the common loss of the whole people; and, hence, when indemnity is received, it may be appropriated to the Government as a common fund belonging to all its citizens alike. But, on the other hand, when a citizen happens to be in a foreign country, as in the present case, and by reason of losses suffered by him in consequence of causes operating alone in that country, without the supervention of a war with his own country, and a reclamation through the peaceful diplomatic instrumentality of his country, for his special benefit, is unsuccessfully made, as in this case, we respectfully submit that a fund thus realized stands upon a different legal basis.

If the Court will examine the record, it will be found from the beginning to the end that Spain and the United States were dealing with *individual* and not *national* claims. In the first place, no demand was made upon Spain for a *national* indemnity. No pretence was made that Spain had committed any wrong against this Government. The convention in its very preamble provides for "an

arbitration for the settlement of the *claims of citizens* of the United States, *or their heirs*, against the Government of Spain." (Convention, Record, folio 60). It was agreed, furthermore, that *all such claims* should be submitted to arbitrators. (Convention, Record, folio 61); "that all claims and the testimony in favor of them shall be *presented* only *through* the Government of the United States" (Convention, Record, folio 60); and that the two governments would "accept the awards made in the several cases submitted to the said arbitration as final and conclusive," and "give full effect to the same in good faith as soon as possible" (Convention, Record, fol. 62).

Turning back through the Record, it will be found that every act relating to this money was with *particular reference to the individual claimant.*

The arbitrators being opposed in opinion, the umpire made his award, in deliberate form, "*in the case of Joaquin Garcia de Angarica vs. Spain,*" stating, among other things, "it is my opinion that *the claimant* has a right to recover damages to the amount of $748,180, with interest at 6 per cent. per annum from this day to the day of payment."

Record, folio 27.

The arbitrator, then, upon motion, reconsiders his decision "*in the case of Joaquin G. de Angarica,*" and dismisses it.

Record, folio 28.

The *payment* is made by Spain specifically by *name, amount and terms* according to the judgments awarded *to each claimant.*

Record, pages 25, 29, 30.

And the money received from Spain, less five per centum reserved, was accordingly *paid by the Secre-*

tary of State to each claimant, agreeably to the judgment he had obtained.

Record, folio 50.

We respectfully submit that this is quite a different transaction from the Geneva Award, essentially a *national indemnity* and *not a settlement of private claims*, which, in the present case, might well have been litigated in the civil tribunals of Spain.

But waiving this, altogether, we contend that even if the original fund from Spain had come impressed with the character contended for, *it lost that character* the moment that Mr. Secretary Evarts—acting presumably at the direction of President Hayes—*decided to pay or* (*if the term be more acceptable*) *dedicate it to Mr. Angarica.*

We have already observed how completely and unqualifiedly this was done.

Further than that, *the whole of the main fund has been paid.* In other words, every dollar of the money paid by Spain has been in turn paid over to the respective claimants.

Now, is it not idle, we respctfully ask, to argue that *this accretion*, realized after the fund upon which it arose had been unequivocally appropriated to the claimant, maintains the characteristics of a fund paid by one nation to another for a national wrong?

The five per centum reserved was not the money of the United States in any sense whatever, for the United States had *completely renounced its claim*, even admitting that it ever had any, and it fully *executed* that renunciation when in 1874, the Secretary of State paid over the five per centum reserve.

Petition, par. 11 and 12, Record, fols 6 and 7.

Clearly, then, the Court below erred in refusing the writ on this ground.

(2.) The second ground upon which the writ was refused was because there was no *express* injunction imposed by *Statute or Treaty* upon the Secretary of State to make the payment demanded.

It is not deemed necessary to preface this branch of the case by a discussion of the powers of the Court below to award the writ of mandamus in a proper case, as that power has been fully established.

See U. S. *v.* Schurz, 102 U. S., 378;
Kendall *v.* U. S., 12 Peters, 526;
Marbury *v.* Madison, 1 Cranch, 127;
McCheney *v.* Seligman, 6 Wheat., 598;
U. S. *v.* Arredondo, 6 Peters, 729;
Gaines *v.* Thompson. 7 Wall., 349.

But the learned Court observes that the convention in question contained in itself (to use the language of the opinion) "nothing relating to any power or duty of the Secretary of State except a provision that he shall name one of the arbitrators. *His official duty is governed, therefore, by the Statute and a refusal to perform a duty imposed by that statute has not been shown.*

Record, folio 67.

The Statute referred to is Section 202 of the Revised Statutes, quoted above.

Record, folio 66.

It is also said by the learned Court below that the agreement with Spain was *not a treaty.*

Record, folio 67.

It is true that the convention did not go through the usual and ordinary course of ratification by the Senate, but it was ratified time and again by appropriations concurred in by the Senate to carry it into effect.

See Act of May 8, 1872, 17 Stat. L., 66;
Act of Feb. 22, 1873, 17 Stat. L., 474;
Act June 11, 1874, 18 Stat. L., 71;
Act Feb. 18, 1875, 18 Stat. L., 327;
Act Aug. 15, 1876, 19 Stat. L., 175;
Act Feb. 26, 1877, 19 Stat. L., 238;
Act June 4, 1878, 20 Stat. L., 98;
Act June 27, 1879, 20 Stat. L., 274;
Act May 14, 1880, 21 Stat. L., 140;
Act Feb. 24, 1881, 21 Stat. L., 345;
Act July 1, 1882, 22 Stat. L., 134;
Act July 7, 1884, 22 Stat. L., 236;

And, as if to manifest a final and unqualified ratification of this convention with Spain, Congress, in July, 1884, passed an act authorizing the President, in conjunction with the King of Spain, to present "to the distinguished gentlemen who have succes-"sively filled the post of umpire in the late Span-"ish and American Claims Commission, suitable "testimonials to express the high appreciation "with which the two governments regard the ser-"vice they have rendered in the adjustment of an "important international question, by the amicable "resort to arbitration."

The Journals of the Senate do not, in every instance, show the vote upon these various acts by "yeas" and "nays." But in two separate instances they do, and the vote in those cases stood more than the constitutional number of two-thirds.

The following references will verify this assertion :

Act 1872. Vote does not apper. Sen. Jour., 1871-2, 539.

1873. Vote does not appear. Sen. Jour., 1872-3, 295.

1874. Vote does not appear. Sen. Jour., 1873-4, 672.

1875. Vote does not appear. Sen. Jour., 1874-5, 142.

1876. "Yeas" 35, "Nays" 17, Sen. Jour., 1875-6, 363.

1877. Vote does not appear. Sen. Jour., 1876-7, 137.

1878. Vote does not appear. Sen. Jour., 1877-8, 341.

1879. Vote does not appear. Sen. Jour., 1878-9, 68.

1880. Vote does not appear. Sen. Jour., 1879-80, 436.

1881. Vote does not appear. Sen. Jour., 1880-81, 93.

1882. Vote does not appear. Sen. Jour,, 1881-82, 461.

1883. "Yeas" 38, "Nays" 2, Sen. Jour., 1883-84, 761.

It is, therefore, respectfully submitted that this convention has received all the conditions of assent to make it in effect a treaty, and that then exists *all the elements of ratification* necessary to make it the "supreme law of the land."

But, independently of ratification, the convention is binding upon the Secretary of State. It is true that the constitution declares treaties to be the supreme law of the land," and that the term treaties is strictly applied only to such as receive the formal ratification of the Senate.

But the declaration of the constitution as to the effect of a treaty is nothing more than an affirmation of the established rule of international law, equally applicable to special or temporary conventions, cartels, truces and capitulations, which are concluded by public ministers, or by military or naval commanders, with the ratification of the sovereign authority. All these engagements bind the officers of the government in whose name they are made and are as much of the law of the land as treaties proper, which, on account of their permanency and binding force upon the nation at large, require in some countries, including the United States, the special ratification of the advisory counsel of the executive.

Grotius, de Jur. Bel. et. Pac., Lib. III., Cap. 22, Secs. 6-8;
Vattel, Droit des Gens., Liv. II., Ch. 14, Sec. 207;
Heffter, Droit International (par Bergson), Sec. 94.
Lawrence's Wheat. Int. Law (2d Ed.), 442; 459, Note; 460.

But it is wholly immaterial whether express command of a treaty or statute be, or be not, shown. It is sufficient if the general rules of law, or the proper fulfillment of the requirements of a statute or treaty, contemplate the act.

This is established law, both Federal and State.

In the case of Morton *v.* Comptroller General, 4 South Car. R., 430, which was an application for a mandamus, the Court, in discussing the question as to what duty was a legal and specific one to warrant the issue of the writ (page 473), said:

"A duty imposed by law is specific when a case "or a state of circumstances exists proper for its

" discharge. *A specific duty may arise in two* " *ways. It may be imposed directly, as when a* " *public officer is directed by statute to execute a* " *particular conveyance to a person by name, or it* " *may arise out of a general duty imposed by law,* " *as when a case or state of circumstances has* " *arisen such as was in the contemplation of the* " *law, imposing such general duty as the object* " *and occasion of its exercise. In either case the* " *duty was specific the moment a proper occasion* " *arises for its exercise.*"

In the great case of Marbury *v.* Madison, 1 Cranch., 137, where an application was made for a mandamus to compel the Secretary of State to deliver a commission to which the relator claimed to be entitled, this Court said :

" It is true that the mandamus now moved for is " not for the performance of an act expressly en- " joined by statute. It is to deliver a commission " on which subject the acts of Congress are silent. " *This difference is not considered as affect-* " *ing the case.* It has already been stated " that the applicant has to that commission „ a vested legal right of which the executive " cannot deprive him. The Act of Congress does " not indeed order the Secretary of State to send it " to him but it is placed in his hands for the person " entitled to it, and cannot be more lawfully with- " held by him than by any other person."

That the principles of Marbury *v.* Madison are still the rule of this Court, see U. S. *v.* Schurz, 102 U. S., 378, 395, *supra.* That was an application for a *mandamus* to compel the Secretary of the Interior to issue a land patent, and this Court said :

" If the relator was entitled to the possession of the patent as his property, and it was the plain duty of the Secretary to deliver it to him when de-

manded, then, under all the authorities, and especially the decisions of this Court, he is entitled to the remedy he asks. And though it may be said that the opinion of Mr. Chief Justice Marshall in that case (Marbury *v.* Madison) was not necessary to the decision made, which was, that this Court had no original jurisdiction in that case, the principles of the opinion have since been repeatedly recognized and acted upon in this Court, and the case cited with approval in its definition of the circumstances under which persons holding public offices will be compelled to perform certain duties which are merely ministerial."

In Kendall *v.* U. S. (12 Pet., 524), a *mandamus* was granted against the Post-master General to compel him to pass to the credit of certain mail contractors a sum found due by the Solicitor of the Treasury, acting under the provisions of a special Act of Congress, which referred the whole controversy to his decision, with no specific direction as to the particular act sought to be required.

Again, in Marbury *v.* Madison, this Court also said:

"It is not by the office of the person to whom the writ is directed, *but the nature of the thing to be done* that the propriety or impropriety of issuing a *mandamus* is to be determined."

Marbury *v.* Madison, 1 Cranch, 137, 170.

The rule applied by this Court in cases of mandamus to the heads of departments of the Federal Government is also said to be undoubtedly the rule which should be applied to the same cases against the heads of departments of State Governments.

See Moses on Mandamus, 84.

In Pond *v.* Parrott, 42 Conn., 13, which was an application to compel the Clerk of the City Board of Police Commissioners to amend a record, the Court said:

"The writ of mandamus lies to compel a public "officer to perform a duty concerning which he is "vested with no discretionary power, and which "*is either imposed upon him by express enactment* "or *necessarily results from the office which he* "*holds.*"

And in the case of the People *v.* Tremain, 17 How. Pr., 10, which was an application for a mandamus to compel the Attorney General to furnish a certificate that certain suits were instituted pursuant to law, the Court said:

"The provision of the Revised Statutes does not directly and in imperative terms require the Attorney General to give the requisite certificate. But surely when a statute provides that an act of a public nature shall be performed upon something to be done by a public officer, that in effect amounts to a corresponding direction."

It is respectfully submitted that these cases show that the Court was clearly in error in refusing the writ because no specific duty was shown in the premises.

The matter of receiving and paying out the Spanish-American Claims award was properly and regularly committed to the Secretary of State in this case, both by the nature and objects of the convention and the statute creating the office and prescribing the duties of Secretary of State, and it is clear, in the light of all the authorities, that specific directions are not requisite to the enforcement of rights depending upon the performance of ministerial duties. In fact, it might be said that if it were necessary to show an express statutory duly in plain terms in order to obtain this remedy, cases of mandamus would be exceedingly rare, for public officers seldom refuse the performance of duties expressly required of them by statute.

Moreover, it has been the settled practice of the Department of State to make these payments without the direction of Congress or of a treaty. Of course, record evidence of this practice is not abundant because no question has ever been before directly raised in regard to it as far as we can discover; but it was incidentally alluded to, and in fact affirmed as settled law, in a comparatively recent opinion of the Attorney-General.

See Stubbs Case, 10 Op. Atty-Gen., 31.

The main question in that case was whether the disbursing clerk of the Department of State was entitled to extra compensation for disbursing money under a very similar convention with Great Britain. The opinion was that no foundation existed for the claim to extra compensation, *because it was the ordinary duty of the Secretary of State to pay such moneys to the claimants of the fund*, and the Disbursing Clerk of the Department was paid a salary for the performance of all ordinary duties relating to the disbursement of funds under its control. The Attorney-General said: "By the Convention of the "United States with Great Britain of 8th Febru- "ary, 1853, Article 4 (10 Stats. at Large, 990), it was "agreed that all moneys awarded by the Commis- "sioners under that convention, on account of any "claim, should be paid by the one government to "the other, and by the 6th Article, the sums award- "ed were taxed for the payment of the expenses "of the Commission, to an amount not exceeding five "per cent. The Department of State had unques- "tioned control of this business, and the moneys "found due from the British government to claim- "ants who were citizens of the United States were "properly paid to the Secretary of State, *whose* "*duty it was to have the same paid to those enti-*

"*tled to receive them.* Surely no more appropriate "or legitimate duty could attach to the disbursing "clerk of the State Department than the charge "and disbursement of these moneys."

No proposition would, therefore, appear to be plainer than that the authority and the duty of the Secretary of State to pay the money in question were full and complete. If this be true, then it was equally his duty to pay *all* the money due to Mr. Angarica, without any reserve, unless authority were given for the retention of a part, either by the convention itself or by some valid law of the United States. Such authority was not given by the Convention, nor does it exist under any law of the United States. It does not even exist under the implied powers of the Secretary of State to diplomatically suspend the operation of a Treaty or Convention, because in the present case such suspension was not in fact established, and could not be established, without the concurrent action of the two governments, and it has, therefore, never been pretended, and cannot be pretended now, that this Convention was ever for a single moment suspended of its full and complete operation.

IV.

All the alleged reasons advanced by the Secretary of State for the retention of the fund in question are insufficient and untenable.

The alleged reasons furnished by him may be summed up as follows:

First.—That by paying the money to the relator he would be overruling the decision of his predecessor, Mr. Frelinghuysen.

Second.—That the Government does not pay interest on the debts, and that therefore, by paying this accretion to Mrs. Angarica, he would violate that rule.

Third.—That while Congress prescribes that trust monies shall be invested in certain securities, the income of such investment does not belong to the owner of the fund, *because Congress has not also legislated upon that subject.*

All these alleged grounds except the last have been considered in the foregoing points of argument, but it may not be amiss to briefly allude to them again.

(1.) The payment of the fund demanded, so far from a reversal of the action of Mr. Bayard's immediate predecessor, would be, as we have already observed, but *an affirmation and ratification of the original decision of his predecessor Mr. Evarts*, who expressly declared (petition, par. 10), that the income of this investment would be paid with the principal. Indeed the position of the respondent seeks to *reverse* Mr. Evarts. Mr. Frelinghuysen, just as he was going out of office, made a *suggestion* that the action of Congress in the Japanese Indemnity Case was "*apparently adverse* to (our) request for the payment of the interest" earned (petition, par. 15); and before this suggestion could be answered by counsel for the relator, Mr. Frelinghuysen retired from office, and Mr. Bayard thereupon seizes upon this and calls it *res adjudicata!*

The respondent does not attribute a like authority to Mr. Evarts' previous decision. He speaks of that as an "*improvident intimation*," and as not binding upon him (petition, par. 21). In other words, Mr. Evarts' circular of 1877, in which he said "the department will expect to keep this re-

serve invested in interest-bearing securities of the United States to cover the delay in its distribution to the claimants," and his letter of 1880, promising to pay the accumulation of the fund resulting from its investment along with the principal (petition, par. 10), were mere *improvident intimations*, whereas Mr. Frelinghuysen's suggestion in 1885, that the action of Congress in the Japanese Indemnity Case, ~~sent a friend out~~ "'*apparently adverse*" to us—an error of both law and fact which counsel had no opportunity to point out—is taken by the respondent as *res adjutdicata*.

(2.) As to the next point, that the Government does not pay interest on its debts, sufficient has already been said to point out the inapplicability of this argument to the present case. Further remark is, therefore, deemed unnecessary.

(3.) The last ground assumed by the honorable Secretary is, that although Congress prescribes that trust moneys shall be invested in certain securities, it is silent as to the disposition of the income. (Act Sep. 11, 1841, Sec. 2, 5 Stat. L., 465; U. S. Rev. Stats., sec. 3659). The answer to this is, that Congress, as it should have done, has simply prescribed the mode of investment, and left the ultimate disposition of the principal as well as income of all trust funds to the *general rules of law as administered by the Courts*.

But the learned Court below so fully and completely disposes of this ground of objection adversely to the respondent, that we beg to refer to its elaborate examination of the point as set forth in the opinion.

See Opinion, Record, folios 68, 69 and 70.

V.

It cannot be said that the act sought to be enforced in this case is one of discretion, or that it in anywise involves discretion. If discretion ever existed in the case at all it was exercised by Mr. Secretary Evarts in 1877, when he declared to the use of the relator's testator the income now demanded. Discretion, if it may be so termed, has been exercised. The authority authorized to decide has acted, and in the language of Chief Justice Marshall in Marbury *v.* Madison (*supra*, p. 157), "*the time for deliberation has passed; he has decided.*" We ask that the decision *be made complete.*

VI.

It is necessary, in order to afford the relator relief in this case that an *official* act be performed by the respondent. He must pay this money *as Secretary of State*, if paid at all. It is a duty, if a duty exists, *appertaining to his office as Secretary of State.*

Manifestly, therefore, there is no remedy, either by statute or by the ordinary forms of action at law, or relief in equity, applicable to the case. The extraordinary remedy by *mandamus* is the only relief available. For this reason, and upon the grounds above considered, we respectfully submit that the judgment below should be reversed with a direction to award the writ as prayed.

F. R. COUDERT,
EDWARD K. JONES,
Counsel for the Plaintiff in Error.

127-257

Office Supreme Court U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1887.

THE UNITED STATES EX REL. LUTZARDA ANGARICA DE LA RUA, executrix, etc., plaintiff in error,
vs.
THOMAS F. BAYARD, SECRETARY OF State.

No. 1241.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY, Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES EX REL. LUTZARDA ANGARICA DE LA RUA, executrix, etc., plaintiff in error,
vs.
THOMAS F. BAYARD, SECRETARY OF State.
No. 1241.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

On the 12th February, 1871, the Governments of Spain and the United States entered into an agreement, without, however, the advice and consent of the Senate, to submit to arbitration the claims of citizens of the United States against Spain for certain injuries inflicted on them by the authorities of the Island of Cuba (17 Stat., 839).

The arbitrators appointed under this convention made a number of awards against Spain, and among them one

for $823,131.23 in favor of the relator's testator, which was paid to him in two installments, on 27th March and 8th October, 1877, less $41,129.74, being 5 per cent. of the sum awarded, a like percentage having been retained by the Secretary of State out of all the other awards to meet the expenses of the arbitration in case Spain should fail to pay the same, as was required by the 6th article of the convention (p. 47), it being the aim of this Government, in withholding this percentage, to prevent the *possibility* of the costs of the proceedings under the convention from becoming a burden on the Treasury of the United States.

So much of the percentage retained "as could be utilized for the purpose" was invested by the Secretary of State in Government securities as was also, from time to time, the increment of those securities.

Finally, there being no longer any occasion for holding it, the Secretary of State, on the 12th February, 1885, paid the relator the sum retained, namely, $41,129.74, but refused to pay the interest which had accrued on the securities in which it had been invested. The Secretary also refused to answer the relator's inquiry as to "*the total amount realized upon such investment* and other particulars touching the same," on the ground that to give the information asked for "would," to borrow his own words, "in effect, be conceding to private parties an accountability which I owe to Congress alone" (p. 15).

It is to compel payment of the undisclosed and unascertained amount of the interest upon a part or the whole of the percentage withheld from the relator, for it does not appear how the fact was, that the mandamus is asked.

The Secretary of State appeared by counsel and answered the relator's petition as follows:

This respondent, admitting the matters and things set forth and averred in the said petition, except as hereinafter excepted, answering saith that it is not true as stated in the third paragraph of the said petition that the said Spanish-American Claims Commission "duly awarded a judgment in favor of the said Joaquin Garcia de Angarica against the said Kingdom of Spain for the sum of $748,180, with interest at the rate of 6 per centum per annum from the 1st day of November, 1875, until paid;" but this respondent saith that an award or judgment for a like sum of money and for like interest was made and rendered by the said Commission in favor of the United States of America, and that the said Joaquin Garcia de Angarica was no party to any proceedings at any time pending before the said Spanish-American Claims Commission; and, as a consequence, this respondent doth also deny that the said sum of money, with the interest thereon, was paid unto the Secretary of State of the United States to the use of or to be paid to the said Garcia de Angarica, as is averred in the fourth paragraph of the said petition, or that upon the said payment it became the duty of the Secretary of State to pay the same to the said petitioner's testator in satisfaction of any judgment or award, for this respondent doth aver that when the said money was received by the then Secretary of State it came to his hands coupled with duties to the United States and possible duties to the Kingdom of Spain, which duties were, in the one case, and would have been in the other case, paramount and superior to any duty in the premises to the said petitioner or her testator.

And this respondent, further answering, saith that the said petition proceeds upon a ground which wholly ignores certain grave international elements and considerations that entered into the claim of the petitioner's testator so soon as the Government of the United States began and assumed to urge and prosecute the same, and that thenceforth the said claim became, in contemplation of law, subject to the will of the Government of the United States, and entirely beyond the control of the said petitioner's testator.

And this respondent, further answering, saith that the interest money demanded in the said petition as the accretion of a part of the said sum of money adjudged and awarded as aforesaid is the

fruit of an investment of the said principal money by the Secretary of State, made in obedience to law and in the performance of a general statutory duty, and not for the use and behoof of the said petitioner's testator.

And this respondent, protesting that no agreemeent to pay the said petitioner or her testator the said interest money was made by the Secretary of State, as is averred in the said petition, doth deny that the Secretary of State could have made a valid agreement in that behalf.

And this respondent, further answering, saith that to place him under the stress of the writ of mandamus as touching the said interest money would be subversive of the established principle that the Government of the United States does not pay interest to its citizens as damages for the detention of money.

And this respondent, further answering, saith, with all deference and respect, that, as the representative of the President of the United States in carrying out a treaty, he can not hold the relation of trustee toward any citizen, saving in the larger sense that every public functionary is clothed with a trust, and that he can not be controlled or directed in the performance of any such duty at the suit of any citizen.

And now this respondent, having fully answered, prays to be hence dismissed with his reasonable costs in this behalf sustained.

T. F. BAYARD,
Secretary of State.

Subscribed and sworn to before me this 17th day of November, A. D. 1885.

JOHN J. CHEW,
Notary Public.

WILLIAM A. MAURY,
Assistant Attorney-General,
of Counsel for the Respondent.

Upon this presentation the application for the writ was denied, on the 7th December, 1885, for reasons fully set forth in the opinion of the court (pp. 48–56.)

ARGUMENT.

This application, it is conceived, must be refused because the relator wholly fails to show that the law has laid the Secretary of State under *any* duty to pay the money demanded, let alone a duty which is enforceable by the writ of mandamus.

The convention creates no such duty, supposing that a convention which has not received the sanction of the Senate's "advice and consent" could have the force of law in the sense in which treaties are declared to be the supreme law.

As the money awarded against Spain and paid by that power has been distributed by the President of the United States through the Secretary of State without the interference of Congress, if the Secretary of State lies under any duty to pay the interest demanded it must be found in the legislation defining the duties of that functionary.

But there, again, we fail to discover that any such duty has been created.

Congress, recognizing the fact that all executive authority touching the foreign relations of the United States is by the Constitution vested exclusively in the President, has, in declaring the duties of the Secretary of State, expressly provided that in all things appertaining to foreign affairs he shall be the mere hand to execute the President's will, which has so absolute sway in the Department of State that even the manner of conducting the business therein is subject to it. From the beginning of the Government such has been the relation that Congress has recognized as existing under the Constitution between the President

and the Secretary of State in all matters appertaining to our intercourse and business with other powers.

The legislation referred to is now embodied in section 202 of the Revised Statutes, which is as follows:

> The Secretary of State shall perform such duties as shall, from time to time, be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct.

It is upon this section that the case turns.

It would seem impossible to doubt that the Secretary of State can not be placed under the stress of a mandamus as to any matter covered by this section without invading the power and discretion of the co-ordinate executive department of the Government. A command to the Secretary of State as to any such matter *must necessarily be a command to the President*, whose will it is the Secretary's duty to carry into effect.

A similar attempt was made in England in the case of the *Queen* v. *The Lords Commissioners of the Treasury.* (L. R., 7; Q. B., 387.)

It was sought in that case to compel by mandamus the lords commissioners of the treasury to pay out of the public money in their hands, and properly applicable thereto, certain costs of criminal proceedings which had been duly taxed, and which the Court of Queen's Bench did not hesitate to say ought to have been paid by them.

Yet, because their lordships were but the hands of the Crown, and to control them would be to control the Crown, the writ was denied.

The Queen is no more above the control of her courts in the performance of her functions than is the President of the United States beyond the reach of his co-ordinate, the judicial department, in the performance of his high functions under the Constitution.

It is to his great constituency, the people of the United States, that the President is accountable, and not to the judicial department.

To subject the Secretary of State to a mandamus, as prayed for, would be to force upon him, who is in no sense *in morâ*, the harsh alternatives of paying the money demanded *de bonis propriis* or going to prison for his recusancy, unless the President, who holds the money demanded, should be minded to come to his relief. If granting the writ would lead to a consequence so absurd, as it undoubtedly would, can a stronger argument be urged for sustaining the judgment?

It would not be more absurd, we humbly submit, to require the Secretary of the Treasury, by mandamus, to pay money for which Congress had made no appropriation than it would be to allow the writ in this case.

Again, the position taken by the plaintiff in error requires that the court should be able to collect from the record that there is absolutely no ground whatever on which the Executive can claim to be invested with a discretion *of any sort* touching the said interest money. Is there anything in the case that would warrant such a conclusion?

But it is not necessary to claim the existence of discretion on the part of the Executive touching the interest money. The case rests on higher ground, namely the co-ordination and co-equality of the three great departments of the scheme of Government contained in the Constitution.

It was in vindication of this co-ordination and co-equality that this court refused to allow the motions to file bills in *Mississippi* v. *Johnson* (4 Wall. 475) and *Georgia* v. *Stanton* (6 Wall. 50), declaring, in refusing the applications, that its interference with the President in the execution of his great functions would be as monstrous as an attempt to control Congress by judicial process.

THERE IS NO DUTY ENFORCEABLE BY SUIT.

No doubt the basis and the measure of the demand of the United States against Spain was the sum of the claims of its citizens for indemnity, but when those claims became the subject of a reclamation by the United States against Spain they passed as entirely under the dominion and control of the United States as if they had never been the subjects of private right.

It was then competent for that Government to release Spain from all obligation in the premises without requiring an equivalent, or to make such adjustment of them as might comport with its ideas of what was fitting and proper. In short, all these private claims became merged and lost in one grand governmental claim.

Having thus become a matter in difference between the two nations, it was absolutely necessary that the transformation from private debts to one great public debt should

take place to enable this Government to deal with the question between it and Spain as purely international, so that if war had been the result of the reclamation, peace might have been made upon the terms of a total abandonment of all claim for indemnity.

This doctrine is of course entirely repugnant to the idea of agency on the part of the Government demanding indemnity for its citizens from another Government. Hampered by such considerations, the subject could not be dealt with from an international point of view, because the questions of private right would be paramount to all others.

The law is stated fully this way by the Court of Claims in its well-considered judgment in the *Great Western Insurance Company* vs. *The United States* (19 C. Cls. R., 217; S. C., 112 U. S. R., 193), which was a suit brought to recover part of a lumping sum paid by England under the treaty of Washington to cover, *inter alia*, a species of loss which Congress had not empowered the Alabama Claims Commission to take cognizance of. The court says:

> When those claimants invoked the aid of the National Government in reference to their reclamations on Great Britain, they sought an exercise by that Government of the sovereign power through which alone this nation speaks to and acts upon other nations.
>
> When the National Government urged upon Great Britain the demands of American citizens on account of the depredations of the rebel cruisers, those demands became reclamations by the sovereignty of this nation against the British sovereign, and passed out of the region of mere private right into the domain of international law, and out of the hands of the citizen into those of his Government.

When they so passed, the authority of the National Government over them became immovable and supreme, not only as between it and the citizen, but as between it and Great Britain. If not so, it was impossible for the United States to have treated honorably with Great Britain in regard to them; for it was Great Britain's high and undoubted right to know that the United States had sovereign power, absolute and unimpeachable, to do what they saw fit in regard to the claims which were the subject-matter of the treaty, and that there was nothing behind to impair or weaken that power.

The same doctrine is laid down with great distinctness in *Rustomjee* v. *The Queen* (1 Q. B. D., 487; S. C., 2 Q. B. D., 69). Of this case Lord Coleridge says in the case next referred to:

The money out of which this is paid to the defendants is a sum of money paid by Great Britain to the United States, from one sovereign state to another; and *Rustomjee* v. *The Queen* is a distinct authority for holding that money being paid by one sovereign state to another in respect of war losses occasioned by the paying state to the subjects of the receiving state, gives no legal right whatever to a particular subject of the receiving state, compensation for whose loss has been paid to that state, capable of being enforced in any court against the sovereign or the government of that state.

It is, therefore, no doubt, clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character.

But, perhaps, the most striking exemplification of the doctrine is given in *Burnand* v. *Rodocanachi* (5 C. P. D., 424; S. C., 6 Q. B. D. (C. A.), 633, and 7 Appeal Cases (H. L.), 333), which was an action by certain underwriters who had insured the cargo of the *Lamplighter*, an American ship, as a war risk. The ship and cargo were totally destroyed by the Confederate cruiser *Alabama*.

Losses of this kind formed an important head of reclamation in the case of the United States before the inter-

national tribunal sitting under the treaty of Washington at Geneva, and a lumping sum to cover all losses under this particular category was awarded and paid to the United States.

In June, 1874, Congress established a tribunal, called the Alabama Claims Commission, for the distribution of this fund, and provided, amongst other things, that parties whose losses were insured should not participate in the fund saving to the extent that their actual losses exceeded the indemnity paid them by the underwriters.

The defendants recovered before the Commission considerably over £6,000, which the plaintiffs sought to have adjudged them as so much money had and received by the defendants to their use. They had judgment in the common pleas division, but the judgment was afterwards reversed on the simple ground that the money awarded was a mere act of grace on the part of Congress, as appears most clearly from what I am about to quote from the judgments of Lord Selborne and Lord Watson. Lord Selborne said, speaking, apparently, for the House:

> Mr. Butt, in his able argument, which was as candid, I think, as it was able, admitted that if a member of the family of the shipowner who had suffered the loss, or the owner of the cargo had, after the insurers had paid the loss, made a will in the precise terms of this act of the Congress of the United States, and had given a fund, over which he had absolute control, for the purpose of indemnifying his relatives or his friends for that portion of the loss which the insurance had not covered, the insurers could not have claimed the gift. *I am unable to see, for any legal purpose, a distinction between such a case and the present.*

Lord Watson said:

> I think that this fund was entirely at the disposal of the legislature of the United States, that it was an act of grace on their part

to assign it, and give it either to one or to the other of the losers by the acts of the *Alabama*, and that in giving it as they have done they were attaching a condition to the gift, which condition was not only entirely within their power, but which they might attach *without violating any legal responsibility or moral obligation.*

Now, it may be said that the difference between this case and the one at bar is that there was no distinct award at Geneva for each person of the class whose aggregate losses made up the sum demanded from England on this head, but *id certum est quod certum reddi potest*, and when the judgment of the Claims Commission was entered the claimants stood towards the fund precisely as though they had been named in the Geneva award. There is no distinction in principle between the Alabama claims award and the awards under the convention of 12th February, 1871; for the award at Geneva was of a sum of $15,500,000 in gold "as the indemnity to be paid by Great Britain to the United States *for the satisfaction of all claims referred to the consideration of the tribunal*, comformably to the provisions contained in Article VII of the aforesaid treaty" (Geneva Arb., vol. 4, p. 53). The sum thus awarded was as fully intended for the citizens of the United States who had been damnified by the Confederate cruisers as were the sums awarded by the convention of 1871 for the sufferers by the lawless proceedings of the Spanish authorities in Cuba, for the award declares, that "*All the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled.*" It is, therefore, under a great misapprehension of the meaning of the Geneva Award that it is stated in the opposite brief (p. 21) that it was "essentially a national indemnity, and not a settlement of private claims." It

was a settlement of "private claims" in the strictest sense.

All that the Alabama Claims Commission did was to determine whether the claimant sued in the case last cited came within the act of Congress, and, as he did, to award him the difference between what had been paid him under his policy and his actual loss.

If the money paid the assured had been paid in obedience to a legal right to it on his part, it was agreed on all hands that the judgment of Lord Coleridge was correct, and it was on the ground that it had not been so paid that that judgment was reversed.

Plainly, then, the principle laid down in England, upon so great consideration, in this purely American case, arising upon an act of Congress, amply justified the President in withholding the principal money of which the sum demanded in the petition is the accretion. It was the money of the United States, and could only cease to be so by being paid into the claimant's hands.

Manifestly, then, if this money was of the moneys of the United States it quite exceeded the power of a Secretary of State to give it to anybody without the authority of Congress, and all that is said in the opposite brief on that head may be readily disposed of on this ground.

Upon a like principle it may be said that no declaration of Mr. Secretary Evarts could cut off the right of his successors to refuse to pay the money in question as being the money of the Government.

The claim urged by the relator's testator for the percentage withheld *was a claim on his own Government*, and

nothing is better established than that the United States does not pay interest or damages for withholding money.

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But we are confronted with a difficulty which belongs rather to procedure than substantive law.

It appears by the relator's petition that only so much of the percentage withheld from her was invested "*as could be utilized for the purpose*" (p. 15). The Secretary of State refused to disclose how much of the sum retained was placed in the public funds or how much interest the amount so placed had earned. So that the relator neither asks for a certain sum, nor does he furnish the data by which his demand may be computed.

But it is of the essence of relief by mandamus that the duty sought to be enforced should be certain and definite, for, if uncertain and indefinite, how can the court commanding performance know whether its judgment has been respected or not? How can the defendant be treated as in contempt when it is not known precisely what he was adjudged to do?

If the relator has a right to judicial interference, in a proper case, then he has a right to evoke from the Secretary of State, in a proper proceeding, the discovery necessary to enable him to present his case.

Nothing is better settled than that equity will not allow a motion to produce a document where it is not perfectly clear what document is referred to in the answer. It was the plaintiff's own fault that he did not except to the answer. And this principle results from the necessity that

there should be an adequate description of the document in order that the court may determine "whether due compliance with its order has been made by the defendant." (3 Danl., Ch. Pr. [2045].)

Now certainly a court of law will not, in awarding a mandamus, proceed on premises that would be too uncertain to warrant an order in equity to produce a document.

In both cases there must be the requisite certainty as to the thing moved for in order to enable the court to vindicate its violated authority and dignity, and prevent itself from being made a derision by contemptuous shifts and evasions.

In this case, should a mandamus ultimately go, how can the court know whether its mandate has been obeyed? The difficulty is insurmountable.

It is submitted that the judgment should be affirmed.

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